ECORD
AND
BRIEFS

No. 15-1391

IN THE

Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, *et al.*,

Petitioners,

v.

ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* CONSTITUTIONAL, ADMINISTRATIVE, CONTRACTS, AND HEALTH LAW SCHOLARS IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

Amici are scholars specializing in constitutional, administrative, contracts, and health law. They submit this brief to underscore the significant departure from precedent urged by petitioners, and to alert the Court to the potential widespread consequences for these respective bodies of law that would follow from acceptance of their theory that heightened First Amendment scrutiny must be applied to the routine regulation of nonexpressive economic activity.[1] A list of the individual scholars is set out in the Appendix.

SUMMARY OF ARGUMENT

"Virtually everything humans do requires the use of language." Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 Harv. L. Rev. F. 165, 179 (2015). If taken to its logical conclusion, the broad view of "speech" advanced by petitioners threatens to subject to heightened First Amendment scrutiny vast swaths of well-established law—from contracts, to antitrust, to anti-discrimination, to health and safety regulations. The consequences of accepting the petitioners' recasting of regulated conduct as regulated speech would be profound, and could drastically impede the ability of democratic self-government to operate.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than Amici Curiae and their counsel made a monetary contribution to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

1. The New York law regulates a merchant's act of setting a price by requiring any charge imposed for credit card use to be included in the stated price. While the act of price setting can only be implemented through words, the regulation of such nonexpressive conduct actualized through speech has never been subject to heightened First Amendment scrutiny. Nothing in the New York law burdens a merchant's constitutionally protected expression. Merchants remain free to disclose that a price includes a cost imposed by banks for credit card use; they may also state a separate price for cash and credit. What they may not do is set a single price that does not include a credit-card fee and then charge a card fee at the register. This is a regulation of nonexpressive economic conduct that nudges some consumers to use credit, and the Second Circuit correctly applied rational basis review.

2. If petitioners' reframing of New York's surcharge as speech were appropriate, the speech they describe is essentially a consumer protection obligation, requiring that a stated price include any cost for credit to avoid consumer confusion. Consumer protection regulations mandating true factual disclosures are subject only to rational basis review under *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), not heightened scrutiny under *Central Hudson v. Public Service Commission of New York*, 447 U.S. 557 (1980). In the alternative, because the New York law is aimed at commercial conduct, not commercial speech, any incidental impact on expression would still be subject to review under the less stringent standard

articulated in *United States v. O'Brien*, 391 U.S. 367 (1968).

3. Accepting petitioners' novel approach that any law regulating economic policy should be subject to scrutiny under *Central Hudson* would have far-reaching consequences, jeopardizing long-standing health, safety, and consumer protection laws that target conduct, but whose scope and application turn on how products or services are described. Such a course could open the floodgates to litigation, asking courts to apply heightened First Amendment scrutiny to well-established regulatory regimes. It would threaten a "retur[n] to the bygone era of *Lochner v. New York*, 198 U.S. 45 (1905), in which it was common practice for this Court to strike down economic regulations adopted by the State based on [its] own notions of the most appropriate means for the State to implement its considered policies." *Central Hudson*, 447 U.S. at 589 (Rehnquist, J., dissenting).

ARGUMENT

I.

NEW YORK'S SURCHARGE BAN IS SUBJECT ONLY TO RATIONAL BASIS REVIEW

A. Laws Regulating Nonexpressive Commercial Conduct Are Not Subject to Heightened Scrutiny

This Court has consistently made a clear-eyed distinction between regulations aimed at commercial conduct and regulations aimed at commercial speech.

Only the latter are subject to heightened scrutiny under *Central Hudson*, a distinction overlooked by petitioners and their amici.

1. First Amendment scrutiny does not apply to the regulation of nonexpressive conduct.

It is axiomatic that laws regulating nonexpressive conduct are not subject to First Amendment scrutiny. As the Court observed in *Sorrell v. IMS Health Inc.*, "restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct." 564 U.S. 552, 567 (2011). A regulation of conduct can, of course, become subject to a degree of First Amendment scrutiny if the regulated conduct itself is expressive. *E.g.*, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-566 (1991) (limiting nudity for dancers at adult bookstores subject to First Amendment scrutiny); *Texas v. Johnson*, 491 U.S. 397, 403 (1989) (regulation prohibiting flag burning subject to First Amendment scrutiny); *O'Brien*, 391 U.S. at 376 (same for draft card burning).

Conversely, a regulation of conduct does not become subject to First Amendment scrutiny "merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949); *see also California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 514 (1972) (holding that speech used as an "integral part" of prohibited conduct is not subject to First Amendment protection); *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 439 (1911) (holding

that words used as "verbal acts" are subject to injunction).

Nonexpressive conduct can take the form of speech, referred to as "speech acts," or "performative utterances." J.L. Austin, *How to Do Things with Words* (2d ed. 1975); *see also Twin City Fire Ins. Co. v. Cty. Mut. Ins. Co.*, 23 F.3d 1175, 1182 (7th Cir. 1994) (defining "performative utterance"). Such speech consists of words that, in context, *do* something. Austin, *supra*, at 4-5. For example, in a marriage ceremony the phrase "I do take this woman to be my lawful wedded wife," or, in a will "I bequeath this watch to my brother," are words that become legally operative in context. *Id.* at 5-7. Likewise, offers, acceptances, and agreements—including criminal agreements—are speech acts, the terms of which are subject to regulation without First Amendment scrutiny. *See Twin City Fire*, 23 F.3d at 1182. The regulation of such speech acts may even require the use of specific words and phrases.[2]

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[2] The Uniform Commercial Code (UCC), for example, requires contracting parties to use very specific expressions to alter certain default rules. *See* Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 Yale L.J. 2032, 2037 (2012). To "exclude or modify the implied warranty of merchantability" in a contract for the sale of goods, the contract must either use the word "merchantability" or expressly state words to the effect that "[t]here are no warranties which extend beyond the description [of the good] on the face hereon." UCC § 2-316(2) (Unif. Law Comm'n 1977). Other legal instruments similarly require the use of specific language or roughly similar statements. *See* 28 U.S.C. § 1746 (1976) (setting forth exact phrasing necessary to effectuate oaths aside from those to appointed offices).

Such performative speech is different from expressive speech in the eyes of the law, and its regulation is not subject to First Amendment scrutiny. For example,

> agreements have long been seen as a regulable communication: "the very plot is an act in itself." . . . A statute might, for instance, require various disclosure obligations for certain kinds of agreements, and impose civil penalties . . . when those obligations aren't complied with. *That is a constitutionally valid regulation of the agreement, even though the burden on speech*—you can't say "I promise to X" unless you also say something else—*is quite deliberate.*

Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 Cornell L. Rev. 981, 1008 (2016) (emphases added). Myriad regulations of performative speech exist that have never been subjected to heightened First Amendment scrutiny.[3]

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[3] *Ohralik v. Ohio State Bar Association* provides numerous examples of speech exempt from First Amendment scrutiny from "corporate proxy statements" to "the exchange of information about securities." 436 U.S. 447, 456 (1978). In *Sorrell*, Justice Breyer gave still further examples of laws involving speech that did not run afoul of the First Amendment. 564 U.S. at 589 (Breyer, J., dissenting).

This same principle applies to speech integral to prohibited commercial conduct. For example, because Congress has banned racial discrimination in the workplace, an employer can be required to "take down a sign reading 'White Applicants Only'" without any need for that restriction to "be analyzed as one regulating the employer's speech rather than conduct." *Rumsfeld v. Forum for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 62 (2006); *see also NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618-619 (1969) (barring employer threats of retaliation for labor organizing activities); *Giboney*, 336 U.S. at 502-504 (barring picketing to force company to violate law); *accord Ohralik*, 436 U.S. at 455-456 (upholding regulation of attorney solicitations); *Pittsburgh Press Co. v. Pittsburgh Comm. on Human Relations*, 413 U.S. 376, 387-389 (1973) (upholding ban on publication of gender discriminating want ads); *Pickup v. Brown*, 740 F. 3d 1208, 1229-1231 (9th Cir. 2014) (upholding prohibition on mental health providers from using sexual orientation change therapy with minors notwithstanding that counseling was conducted via words), *cert. denied* 134 S. Ct. 2871 (2014).

Speech that does no more than actuate nonexpressive commercial conduct or is integral to prohibited conduct is not subject to First Amendment scrutiny.

2. The regulation of prices is a regulation of commercial *conduct*, even though prices are conveyed through words.

This same distinction applies to pricing regulations. States have long regulated prices set by a merchant. Legislatures may directly set prices, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (plurality opinion); set minimum prices, *see id.* at 530 (O'Connor, J., concurring); and set maximum prices, *Munn v. Illinois*, 94 U.S. 113, 125 (1877). Likewise, regulations and common-law rules requiring merchants to meet certain conditions before altering a set price have always been recognized as regulations of economic activity, not speech.

For example, SEC Rules 14e-1(a) and (b) require that tender offers remain open for at least twenty business days, and that an offeror may not change the percentage of securities sought or the consideration offered without extending the offer for at least ten business days from the date of the amendment. 17 C.F.R. § 240.14e-1(a)-(b) (2008). Similarly, most courts agree that under the common law of contracts, offerors may not materially alter or revoke unilateral offers once an offeree has partially accepted the offer or relied to their detriment thereon. *See* 1 Williston on Contracts § 5:13 (4th ed. 2015) ("Williston"); Restatement (Second) of Contracts § 90 (Am. Law Int. 1981) ("Restatement"). Such rules governing pricing behavior regulate commercial conduct, notwithstanding that some speech is integral to that conduct.

The evolution of the commercial speech doctrine has not altered this distinction. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, this Court held that a legislature cannot wholly prohibit merchants from communicating "[t]he 'idea'" that "I will sell you . . . X . . . at . . . Y price," without the law passing heightened judicial scrutiny. 425 U.S. 748, 761 (1976). But a law prohibiting the *communication* of a set price, as did the law at issue in *Virginia Pharmacy*, is distinct from a law directly regulating the *setting* of a price. The former is a regulation of commercial speech, while the latter is a regulation of commercial conduct.

Virginia Pharmacy did not erase this distinction, nor did it limit a state's ability to regulate speech proposing an illegal transaction. *See United States v. Williams*, 553 U.S. 285, 297 (2008) (upholding criminalization of solicitation of child pornography). Such speech may be regulated without heightened scrutiny, even when that prohibits the communication of a price. *E.g., Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 611-612 (2003) (upholding punishment of fraudulent fundraising); *Nat'l Soc'y of Prof. Engineers v. United States*, 435 U.S. 679, 697 (1978) (upholding an injunction barring competitors from discussing prices).

As this Court reaffirmed in *Ohralik*, a state does not lose its power to regulate commercial activity the legislature deems "harmful to the public" simply because speech is a component of that activity, and "neither *Virginia Pharmacy* nor *Bates*

[*v. State Bar of Arizona*, 433 U.S. 350 (1977)], purported to cast doubt on the permissibility of [this kind] of commercial regulation." 436 U.S. at 456. To the contrary, "an expansive interpretation" of the First Amendment as applying to speech integral to prohibited conduct "would make it practically impossible ever to enforce laws against agreements in restraint of trade." *Giboney*, 336 U.S. at 502.

B. New York's Surcharge Ban Regulates Nonexpressive Commercial Conduct And Is Not Subject To Heightened Scrutiny

Petitioners describe New York's surcharge ban as restricting "only what merchants may say about their prices, not what they may charge." Resp. Br. 26. This description misconstrues both the language of the law and its impact on merchant behavior.

1. The plain terms of § 518 regulate only a merchant's conduct.

On its face, New York's surcharge ban directly regulates only what merchants may do, not what they may say. It specifies that "[n]o seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means." N.Y. Gen. Bus. Law § 518. The plain meaning of "surcharge" is "an additional tax, cost, or impost," *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003), or "[a]n additional . . . charge," *Black's Law Dictionary* (10th ed. 2014). In context, the Second Circuit properly concluded that an "additional charge," must mean a charge in addition to the "usual," "normal," or "regular price" "that serves as a

baseline for determining whether credit-card customers are charged an 'additional' amount that cash customers are not." Pet. App. 13-14a.

The plain language of § 518 thus prohibits merchants from setting a price and subsequently imposing any additional charge above that price when a customer pays by credit card. Setting a price is conduct, not speech.

2. Even as applied, § 518 does not burden expressive speech.

Because § 518 regulates only the *act* of imposing a surcharge, it is not subject to First Amendment scrutiny unless it indirectly burdens protected speech or expressive conduct as applied. *See O'Brien*, 391 U.S. at 376; *Sorrell*, 564 U.S. at 567. Petitioners claim that it does, as applied to two pricing schemes. Four petitioners would like to set prices for their goods and services and separately identify the amount of a surcharge they would apply to credit-card customers only. Pet. Br. 20-21. One petitioner currently posts two prices for its services—a cash price and a credit-card price—but fears prosecution if it characterizes the difference between the two prices as a "surcharge" for credit. Pet. Br. 20.

Although the Court of Appeals abstained from deciding the issue,[4] nothing in § 518 prohibits a

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[4] Pet. App. 28-40a. For the reasons stated by respondents, the Court need not address this issue further. Resp. Br. 30.

merchant from using a dual price system, setting a separate price for credit and for cash; it simply bars the imposition of any additional charge once a price is set. New York has "disavowed any interpretation of § 518 under which . . . dual-price sellers will be prosecuted simply because their employees happen to *refer* to their pricing schemes as involving a 'surcharge.'" Pet. App. 40a; *see* Resp. Br. 28. And in the single-price application of the law addressed by the Second Circuit, § 518 is plainly a valid regulation of economic conduct.

Petitioners object that § 518 does not regulate conduct because it does not effectively prevent price discrimination between cash and credit customers. In their view, the law's only effect is to regulate what a merchant may say because a "'surcharge' and a 'discount' are just two ways of framing the same price information." Pet. Br. 1. This analysis of the law and its impact fails on inspection.

First, liability under § 518 does not turn on expression. Whether called a "negative discount," a "penalty," a "credit-card tax," or a "baloney sandwich," § 518 prohibits the *act* of imposing a credit-card swipe fee, not what it is called.

Second, § 518 does not limit expression. The statute imposes no muzzle on a seller's ability to communicate that there is a cost for credit-card usage, and expressing support for, or opposition to, the costs imposed by credit card companies. Merchants that set a single price remain free, for example, to state explicitly that the price includes a fee for credit-card charges, or even describe a portion

of its price as a credit-card "surcharge," as long as it is included in the stated price. Resp. Br. 37-39.[5]

Third, § 518 regulates behavior. Saying "my price is $102 with a $2 cash discount" or "my price is $100 with a $2 surcharge for credit," may present the same economic proposition to a consumer, but each involves different merchant conduct. In one case, the merchant sets the baseline price at $100 and in the other at $102. Setting a price has a variety of consequences for a merchant, such as how the price is advertised to consumers, how taxes are calculated, how commissions are determined for employees, etc. Setting a price is the merchant conduct regulated by § 518.

Finally, the only speech § 518 prohibits is communication that "evidence[s]" and "initiate[s]" the imposition of an illegal surcharge; but such speech integral to criminal conduct is not subject to First Amendment scrutiny. *Giboney*, 336 U.S. at 502. The limited speech prohibited by § 518 is no more subject to heightened scrutiny than the

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[5] Because liability under § 518 does not turn on expression or limit expression, petitioners' reliance on *BellSouth Telecommunications, Inc. v. Farris*, 542 F.3d 499 (6th Cir. 2008), is entirely misplaced. *See* Pet. Br. 30 n.6, 34, 37, 42-44. The Kentucky statute in *BellSouth* imposed a 1.3% tax on a telecommunications service provider's gross revenues and specified that "[t]he provider shall not . . . separately state the tax on the bill to the purchaser." 542 F.3d at 501. The Kentucky law thus barred a service provider from disclosing true factual information, and it imposed liability based on the content of a service provider's commercial speech. Section 518 does neither.

prohibition of a "White Applicants Only" sign following enactment of a law prohibiting employment discrimination. *See Rumsfeld*, 547 U.S. at 62. The legislature's prohibition of a credit-card surcharge is simply not subject to First Amendment scrutiny, even though prices are conveyed in words.

Properly understood, § 518 acts as either a price-setting regulation or a regulation on the conditions for altering an offer to sell. On the one hand, § 518 can be viewed as setting the maximum price a merchant may charge at the point of sale: the stated price. Viewed differently, § 518 prohibits merchants from offering to sell a good or service at a posted price and subsequently amending the offer by imposing an additional credit-card swipe fee. Either way, § 518 regulates economic conduct, not speech, and thus stands in contrast to the regulations directly prohibiting commercial speech that this Court has subjected to heightened scrutiny. *See, e.g., Sorrell*, 564 U.S. at 572-573 (striking down ban on the sale of prescriber-identifying information to drug makers); *Central Hudson*, 447 U.S. at 571-572 (striking down ban on promotional advertising by a regulated utility); *Virginia Pharmacy*, 425 U.S. at 773 (striking down ban on displaying drug prices).[6]

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[6] This distinction between regulating conduct not speech also renders inapposite the decision in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), in which the Court applied First Amendment scrutiny because the "conduct triggering coverage under the statute consists of communicating a message." *Id.* at 28. Here, the conduct triggering coverage under § 518 is not the communication of any message, but the economic conduct of setting a price.

The Second Circuit correctly subjected § 518 to rational basis review as a regulation of price-setting. *See, e.g.*, *Gonzales v. Raich*, 545 U.S. 1, 19, 22 (2005); *Dandridge v. Williams*, 397 U.S. 471, 484-485 (1970).

II.

EVEN VIEWED AS A REGULATION OF EXPRESSIVE CONDUCT, THE SURCHARGE BAN IS NOT SUBJECT TO THE HEIGHTENED SCRUTINY SOUGHT BY PETITIONERS

To the extent that the New York pricing regulation can be viewed as implicating a merchant's commercial speech, it does so without triggering the type of heightened First Amendment scrutiny urged by petitioners.

A. Section 518 Is A Consumer Protection Regulation Subject Only To Rational Basis Review

If viewed as a regulation on speech, § 518 simply requires merchants to disclose factual information (a price that includes any credit card swipe fee) in a manner that avoids misleading consumers, just like many other consumer protection regulations. In contexts from nutritional labeling to vehicle safety ratings to truth-in-lending requirements, "the government requires private actors to 'speak' in order to give the public more information about products and services." *See* Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. Pa. J. Const. L. 539, 541 (2012)

("Government-compelled commercial speech is ubiquitous.").

If stating a price is expressive conduct, § 518 acts in this same manner. It does not *ban* communication about surcharges in the way that the law at issue in *Virginia Pharmacy* banned pharmacists from advertising their prices, but rather regulates the *manner* in which swipe fees are *presented* to ensure consumers are not confused when they engage in comparison shopping or deceived in a "bait-and-switch" scheme. *See* Resp. Br. 49. This distinction is outcome determinative because there are "material differences between disclosure requirements and outright prohibitions on speech." *Zauderer*, 471 U.S. at 650.

The primary reason this Court extended First Amendment protection to commercial speech was to increase the flow of truthful commercial information to consumers. *Id.* at 651. While commercial actors have a substantial interest in avoiding restrictions on their dissemination of truthful information, their "protected interest in *not* providing any particular factual information . . . is minimal." *Id.* Accordingly, laws mandating factual disclosures to prevent consumer deception are subject only to rational basis review. *See, e.g.*, *id.* at 651 (upholding Ohio law mandating certain disclosures in advertisements for lawyers in contingent fee cases).[7]

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[7] Indeed, many circuits have applied *Zauderer* to commercial disclosure laws that are not aimed at preventing consumer deception at all. *See, e.g.*, *American Meat Institute v. U.S. Department of Agriculture*, 760 F.3d 18 (D.C. Cir. 2014) (en

Addressing a statute similar in many respects to § 518, the Court of Appeals for the District of Columbia Circuit held that a law requiring airlines to post the *full price* of airline tickets *including tax* instead of two prices (the base price and the tax) was a valid restriction on commercial speech that withstood a First Amendment challenge under *Zauderer*. *See Spirit Airlines, Inc. v. U.S. Dep't of Transp.*, 687 F.3d 403 (D.C. Cir 2012), *cert. denied* 133 S.Ct. 1723 (2013).[8] The Court rejected *Central Hudson* as an inappropriate standard of review because the law was directed at misleading speech *and* because it did not impose an affirmative limitation on speech since the airlines remained free to break out the price of tax as long as they also displayed the *total price* prominently. *Id.* at 413-14. The make-or-break issue was the fact that the airlines could "even call attention to taxes and fees in their advertisements" as long as they did not "call attention to them by making them more prominent than the total, final price the customer must pay." *Id.* at 414. Similarly, in *Poughkeepsie Supermarket Corp. v. Dutchess County*, the Second Circuit summarily dismissed a challenge to a local law that

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banc) (upholding a USDA country-of-origin labeling requirement for meat products); *N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114 (2d Cir. 2009) (upholding health regulation requiring chain restaurants to post calorie-content information); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005) (upholding law requiring pharmacy benefit managers to make mandated financial disclosures), *cert. denied* 126 S. Ct. 2360 (2006).

[8] The law at issue in *Spirit Airlines* was distinct from § 518 in that it regulated only how prices were communicated, not how they were set.

mandated price stickers be placed on the actual items for sale and subjected the law to *Zauderer* scrutiny, not *Central Hudson*. 648 Fed. App'x 156, 157-58 (2d Cir. 2015); *see also Poughkeepsie Supermarket Corp. v. Dutchess Cty.*, 140 F. Supp. 3d 309, 313 (S.D.N.Y. 2015) (doubting whether this case "involve[d] speech at all").

Section 518 clearly passes muster as well. It does not restrict disclosure of credit-card fees, it simply requires them to be included in a single price.

B. Section 518, At Most, Incidentally Burdens Commercial Speech And Is Thus Subject To Minimal Scrutiny

Should the Court disagree, and find that § 518 burdens a merchant's commercial speech beyond imposing a mandatory consumer protection obligation, any such burden is indirect and incidental to § 518's regulation of conduct. Laws that do not facially regulate speech, but by their operation incidentally burden expression, are reviewed under the standard established in *O'Brien*, not under the enhanced scrutiny applied in *Central Hudson* for laws that directly regulate commercial speech.

Under *O'Brien*, a law does not violate the First Amendment

> if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction

> on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377; *see also Humanitarian Law Project*, 561 U.S. at 28 (clarifying that the *O'Brien* standard applies to statutes aimed at conduct as long as the regulation, as applied, is unrelated to expression).

When the government demonstrates a substantial interest and its purpose in regulating is unrelated to the suppression of free expression, the law survives review. As explained in *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989), the final prong of the test is very loosely applied. This Court has "not insist[ed] that there be no conceivable alternative [to the law], but only that the regulation not burden substantially more speech than is necessary to further the government's legitimate interests. . . . And the Court has been loath to second-guess the Government's judgment to that effect." *Id.* at 478 (internal citations and quotations omitted). For example, in *Turner Broadcasting System, Inc. v. Federal Communications Commission*, Justice Kennedy, writing for the Court, explained that the merits of a content-neutral regulation is properly left to the legislative branch: "It is for Congress to decide [the Government's interests] . . . and the validity of its determination does not turn on a judge's agreement with the responsible decisionmaker concerning . . . the degree to which [the Government's] interests should be promoted." 520 U.S. 180, 193 (1997)

(Kennedy, J.) (internal citations and quotations omitted).

It also bears emphasis that the regulation in this case aims at commercial conduct that only incidentally affects commercial speech. The *O'Brien* standard for scrutinizing the impact of a regulation that incidentally burdens political speech should thus be applied in a particularly forgiving manner, because commercial speech is entitled to less protection than other protected forms of speech. *See Fox*, 492 U.S. at 477.

Section 518 easily passes the minimal scrutiny required under *O'Brien*. As explained by respondent, New York has many legitimate interests unrelated to the suppression of free expression that are advanced by the law, and any incidental restriction on speech is sufficiently tailored to satisfy *O'Brien*. Resp. Br. 44-56.

III.

ADOPTING PETITIONERS' APPROACH TO REGULATIONS AIMED AT NONEXPRESSIVE COMMERCIAL CONDUCT WOULD HAVE FAR-REACHING, ADVERSE CONSEQUENCES

Petitioners make the defensive claim that "this Court can easily strike down the no-surcharge law without expanding the category of laws subject to First Amendment scrutiny," Pet. Br. 35, but they provide no basis for distinguishing § 518 from other regulations that burden speech integral to nonexpressive economic conduct or that mandate consumer protection disclosures. Subjecting such

laws to heightened scrutiny under *Central Hudson*, as petitioners urge for § 518, would undermine long-standing legislative and agency policies controlling economic activity and open the doors to a flood of new litigation. Routine commercial regulations and garden-variety enforcement actions would be disrupted by new First Amendment claims; judges would be required to weigh the governmental interests served by innumerable laws regulating economic conduct; and, complex regulatory schemes involving consumer protection, public health, and public safety could be upended. The theory advanced by petitioners in this case is a wolf in sheep's clothing, inviting a dramatic reallocation of policymaking power from legislators to judges. *Cf. Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). It should be rejected.

A. Applying Heightened Scrutiny To The Regulation of "Speech Acts" Would Subject Entire Realms of Economic Regulation To New Judicial Scrutiny

1. Economic regulations that shape "choice architecture" would become targets of litigation.

Petitioners urge that § 518 should be subjected to heightened scrutiny because, in their view, it "demand[s] one way of framing dual pricing over another." Pet. Br. 30; *see* Br. of Scholars of Behavioral Econs. as Amici Curiae Supp. Pet. 11 ("Amici Econs. Br.") (arguing that merchants must be free to frame consumer choices). Adopting that position would expose to First Amendment challenge countless laws enacted to influence economic conduct

by regulating the context in which choices are made. "Choice architecture" loosely refers to the organization of the context in which people make decisions, based on the insight that people make choices "in an environment where many features, noticed and unnoticed, can influence their decisions." Richard Thaler et al., *Choice Architecture* (2010), https://ssrn.com/abstract=1583509; *see* Richard Thaler & Cass Sunstein, *Nudge* 3 (2008).

Research bears out the effectiveness of steering individual decisions by altering the choice architecture in which those decisions take place. For example, the institution of a cap-and-trade mechanism to control acid rain is believed to have been far more successful than a command-and-control mechanism would have been in ensuring compliance with emissions regulations, while at the same time saving hundreds of millions of dollars. Thaler & Sunstein, *supra*, at 187-188. Or, pre-paying teacher bonuses with a corresponding threat to take the bonuses back if students perform poorly generates better student outcomes than offering teachers end-of-year bonuses tied to student achievement. *See* Amici Econs. Br. 6.

Section 518 is such a regulation—one that "nudges" rather than mandates an outcome. As petitioners' and their amici acknowledge, customers are less likely to use credit cards if a "surcharge" is imposed on customers using credit rather than if a "discount" is given to customers paying by cash due to the cognitive bias known as "loss aversion." Amici Econs. Br. 4-11; *see* Thaler & Sunstein, *supra*, at 33. By requiring any credit-card fee to be included in a

merchant's single stated price, New York's law "nudges" a consumer's behavior while retaining consumer options, and it is a nudge the legislature could reasonably want to make for a number of reasons. For example:

- Prohibiting a credit sur-charge limits the ability of merchants to "pad" their swipe fees and curtails profiteering on excessive fees. Adam J. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321, 1352 (2008).

- Promoting credit card use facilitates bookkeeping and currency conversion and decreases the merchants' theft and credit risks. *Id.* at 1342.

- Credit-card purchases leave evidentiary trails that facilitate law enforcement and assist recovery by civil plaintiffs. *See, e.g., United States v. Maturo*, 982 F.2d 57, 59 (2d Cir. 1992) (DEA subpoena for credit-card purchases in the investigation of drug smuggling).

Like § 518, the functioning of a multitude of regulations could be dissected and criticized as having no real effect other than limiting "speech," because in dictating how choices are presented they leave consumers with "economically equivalent" choices. *See* Amici Econs. Br. 11. Like § 518, these ubiquitous laws alter the "choice architecture" without limiting the discussion of any topic, idea, or expression. Yet, under petitioners' approach, these

regulations would all become subject to First Amendment scrutiny.

Take for example, mandatory opt-in/opt-out regulations. Several states have enacted laws requiring certain employers to automatically enroll employees in voluntary state-managed retirement plans and automatically deduct contributions to the plans from employees' earnings, unless the employees explicitly opt out of the plan.[9] Under these laws, employers must require employees to "opt out" and are prohibited from presenting employees the option to "opt-in," even though "opting in" and "opting out," like "surcharges" and "discounts," "are just two ways of framing the same . . . information." Pet. Br. 1. An "opt in" or "opt out" regime is actuated solely through speech: either the employer is required to ask employees whether they wish to *join* the retirement plan, or it is required to ask whether they wish to *not join* the plan.

New York's scheme is nothing other than such a government-mandated opt-out rule: Businesses must include swipe fees in their stated price but may allow consumers to opt out of paying those fees if they use cash. Allowing a surcharge for credit would be an opt-in rule. Accepting petitioners' argument, all such laws would have to be assessed by judges

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[9] *See, e.g.*, 2016 Md. Laws, Ch. 323 (S.B. 1007); 2015 Or. Laws, Ch. 557 (H.B. 2960); Illinois Secure Choice Savings Program Act, 2014 Ill. Laws, Pub. Act No. 98-1150 (S.B. 2758); California Secure Choice Retirement Savings Act, 2012 Cal. Stat., Ch. 734 (S.B. 1234). Federal law also preempts state laws that would prohibit such automatic contribution arrangements. 29 U.S.C. § 1144(e) (2006).

applying *Central Hudson*. State lawmakers and regulators would thus be subjected to substantial new burdens in regulating economic activity.

Other examples of framing regulations that could be dissected to locate an impact on speech abound. Consider, for example, prohibitions on offering discounts for harmful products. To discourage the consumption of tobacco, a city could enact an ordinance prohibiting retailers from accepting coupons or offering multi-pack discounts for tobacco products, while still permitting retailers to set their own prices. Although a discount coupon is "economically equivalent" to lowering the "sticker" price, under settled principles a city is currently permitted to prohibit discount coupons on a rational basis review as an act of economic regulation.

Indeed, the First Circuit held just this in refusing to apply First Amendment scrutiny to such a prohibition designed to curb underage smoking. *See Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence*, 731 F.3d 71, 77-79 (1st Cir. 2013). As the First Circuit properly recognized, the law implicated important legislative prerogatives: the prerogative to protect the health and safety of adolescents. *See also, Nat'l Ass'n of Tobacco Outlets, Inc. v. City of New York*, 27 F.Supp.3d 415, 424 (S.D.N.Y. 2014) (applying no First Amendment scrutiny to ban on selling tobacco products below the merchant's stated price because the "offers that are restricted by the ordinance are offers to engage in an unlawful activity").

Erasing the distinction between speech integral to conduct and expressive speech could

likewise cast doubt on regulations of speech acts that have never been subject to First Amendment challenge. For example, it is hornbook law that an amount of liquidated damages in event of a breach may be specified in a contract, while a pure penalty that is contractually imposed for a breach is typically unenforceable. Williston § 65:1. The distinction between these two types of clauses is well-settled—a liquidated damages clause provides payment of "reasonable" damages for actual or estimated losses, while a penalty provides payment in excess of "reasonable" losses. Restatement § 356 cmts. a & b. In practice, however, difficulties in measuring what constitutes "losses" and what is "reasonable" often render the difference between the two semantic. *Id.*; *see also* Williston § 65:11. The same stipulated payment arising from the same course of conduct might be enforceable or not, depending upon how it is characterized.

This principle of contract law is nothing more than a judge-made nudge arising out of aversion to punitive provisions. *See* Restatement § 356 cmt. a. It too affects speech: Contracting parties may not call something a "penalty," but are permitted to call the same payment a liquidated damages clause. Petitioners' preferred rule would imply that this longstanding rule in contract law should be viewed as a constraint upon commercial speech, and is thus subject to *Central Hudson* scrutiny. Yet no one seriously considers that this black-letter principle must be subjected to *any* First Amendment scrutiny, much less the *Central Hudson* test.

Petitioners' position is broader still, reaching laws and rules that are not obviously intended to nudge. Every law, in some sense, sets a "default" that shapes the environment in which individual decision-making occurs and thereby frames decision-making. *See* Ayres, *supra*. "Choice architecture, both good and bad, is pervasive and unavoidable, and it greatly affects our decisions." Thaler & Sunstein, *supra*, at 252. Unless the Court intends to promote judicial review and assessment of the modern regulatory state, it should reject petitioners' invitation to subject framing laws shaping economic choices to heightened scrutiny whenever speech actuates or is integrally related to regulated commercial conduct.

2. Economic regulations that burden speech integral to conduct would also become targets of litigation.

If petitioners prevail, laws that burden speech that simply actuates commercial conduct could become subject to First Amendment scrutiny in many contexts. Accepting petitioners' approach to commercial regulation would raise future questions about everything from mandated contract language to employment discrimination to antitrust law. And it would produce untold collateral consequences by requiring the government to justify under *Central Hudson* how complex regulatory schemes are crafted to promote a sufficiently important interest in the "least restrictive" way. Many of the laws that may be most affected, however, ironically share the very goal that petitioners aim to promote: consumer protection.

For instance, decades of food and drug regulations could become subject to new judicial scrutiny if petitioners prevail. The FDA's regulation of the sale and marketing of drugs necessarily looks to commercial communications and vividly illustrates the stakes at issue. One of the FDA's most important powers is its ability to preclude the sale of medicines for which there is not sufficient evidence that they are "safe and effective" for the purposes of use intended by the manufacturer. 21 U.S.C. § 355. This power has protected the public for decades from events like the thalidomide disaster. That drug was intended to reduce nausea in pregnant women, and only because of the insistence of an intrepid FDA reviewer was never approved in the United States. It was approved and widely-used abroad, however, and caused thousands of birth defects and deaths because it had not been appropriately studied. *See* James H. Kim & Anthony R. Scialli, *Thalidomide: The Tragedy of Birth Defects and the Effective Treatment of Disease*, 122 Toxicological Sci. 1, 1 (2011), http://toxsci.oxfordjournals.org/content/122/1/1.full.pdf+html.

The FDA's power to ban unproven medicines from the market is a regulation of conduct—the distribution of potentially dangerous medicine—but it is triggered through speech. Whether a product is a "drug" subject to the FDA's premarket approval depends on whether the seller makes therapeutic or curative claims about the product. *Whitaker v. Thompson*, 353 F.3d 947, 953 (D.C. Cir. 2004) ("[The]

classification of a substance as a 'drug' turns on the nature of the claims advanced on its behalf.").[10]

For example, while a company is free to sell a plant extract for use as a furniture polish without permission from the FDA, if the company claims that the extract cures cancer, the FDA then has the authority to prohibit its sale until the company demonstrates with sufficient evidence that the product's benefits outweigh its risks with respect to that claimed use. *See United States v. Rutherford*, 442 U.S. 544 (1979) (holding that the FDA can prohibit the sale of a plant extract until drug company proves safety and effectiveness). Speech alone—in the form of a therapeutic claim—constitutes and defines the "conduct" of distributing a drug that is subject to the FDA's premarket approval. If this Court proceeds down the path proposed by petitioners, the FDA's regulation of the conduct of distributing an unapproved drug could soon be subject to heightened scrutiny because the FDA's power to regulate arises from what the seller *says*.

Focusing on the speech implications of any economic regulation could quickly subject the complex statutory scheme for regulating drugs to mountains of litigation seeking enhanced judicial

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[10] The very definition of a "drug" subject to regulation, and the conduct of introducing a drug into interstate commerce, are largely determined through the manufacturer's speech. 21 U.S.C. § 321(g)(1)(B) (2009) (definition of "drug" based on the product's "intended" "use"); 21 C.F.R. § 201.128 (1976) ("intended use" can be determined by claims made by the manufacturer).

scrutiny of any FDA action that incidentally burdens commercial speech. Applying the *Central Hudson* test would shift the evidentiary burden from a drug manufacturer onto the government. In this brave new world, the government would have to defend decades of regulatory practice against *Central Hudson* review, and only bar unproven medicines from the market if it could show that it had a substantial interest, and sufficient tailoring, to limit the safety or therapeutic claims being made by every distributor of a quack drug.[11] Petitioners' approach could turn back the clock to an era when unsafe and ineffective medicines could be widely sold to physicians and patients. It would also undermine our world-leading pharmaceutical industry, which relies strongly on regulation to reassure consumers of the reliability of its treatment claims.

Adopting petitioners' approach would assign to judges the power to veto countless economic regulatory decisions properly left to the political branches. But judicial "[d]oubts concerning the policy judgements" behind economic regulations "do not . . . justify reliance on the First Amendment" as a basis for reviewing them. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 476 (1997).

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[11] The notion that First Amendment law could upend drug regulation is far from fanciful. In *United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012), the Second Circuit concluded that *dicta* in *Sorrell* implied the FDA's power to restrict the marketing of *approved* substances for *unapproved* uses might violate the First Amendment.

B. Even Viewing § 518 As Burdening Commercial Speech, Requiring Heightened Scrutiny Would Subject Many Regulations To Heightened Judicial Scrutiny

Even if § 518 is viewed as compelling or burdening speech, not conduct, applying *Central Hudson* scrutiny to this type of commercial speech regulation would invite new judicial review of many long-standing regulatory regimes that necessarily limit commercial communications integral to commercial conduct.

Many statutes, both at the state and federal level, regulate the manner in which commercial speech may be compelled and could be jeopardized if subjected to *Central Hudson* scrutiny—a dangerous possibility suggested by petitioners' line of reasoning. For example, the Truth in Lending Act (TILA), 15 U.S.C. 1601 *et seq.* (2012), as implemented by Regulation Z, 12 C.F.R. 1026 *et seq.* (2015), contains extensive requirements regarding required disclosures and prohibited language binding creditors in contexts including provision of high cost and reverse home mortgages, 12 C.F.R. § 1026.32 (2014); 12 C.F.R §1026.33 (2011), private educational loans, 12 C.F.R. § 1026.46 (2011), and open-ended and closed-ended credit, 12 C.F.R. § 1026.51 (2013); 12 C.F.R. § 1026.17 (2015). The law and implementing regulations detail the manner and timing of disclosures required regarding interest rates, finance charges, and circumstances resulting in increases in annual percentage rates. There are strict rules regarding the language that can be used

in oral disclosures. *See* 12 C.F.R. § 1026.26 (2011) (oral disclosures regarding annual percentage rate). Regulation Z contains extremely specific requirements governing consumer credit advertising, including provisions identifying terms that, if stated, require further disclosures, *id.* § 1026.16(b); and provisions prohibiting the use of certain phrases, *id.* § 1026.16(d)(5). But according to petitioners' theory, heightened First Amendment scrutiny is required if lenders must inform consumers in one way rather than another.

Federal labeling requirements for auto sales provide another example of a consumer protection disclosure law that would be subjected to heightened scrutiny under petitioner's approach. Every car manufacturer is required to label each vehicle with specific details concerning when and where it was manufactured, the method of delivery to the dealer, the manufacturer's suggested price, its safety ratings and more. *See* 15 U.S.C. § 1232 (2012).

Or consider the regulatory authority extended to the Food and Drug Administration. The FDA can require specific warning language, contained in a box at the top of a drug's label (a so-called "black box" warning), in cases where use of a drug may expose a patient to one or more particularly serious risks. 21 U.S.C. § 355 *et seq.* (2015); 21 C.F.R. § 201.57 (2015). The FDA's enabling legislation and regulations give the agency authority to both specify and limit the label language that may accompany drugs, biologics, and medical devices approved for the U.S. market. That is, the FDA can require that the facts be stated one way, even if drug manufacturers believe that

there is no difference in the descriptions. If the FDA were required to defend every labelling decision and the text of every black box warning in court, the burdens on the agency would be astronomical, and the agency's ability to engage in its congressionally mandated tasks fatally compromised.

There are "literally thousands" of regulations on the books that compel the disclosure of economically significant information, including "product labeling laws, environmental spill reporting, accident reports by common carriers, [and] SEC reporting as to corporate losses." *Pharm. Care Mgmt. Ass'n*, 429 F.3d at 316. If this Court accepts petitioners' plea to transform the New York pricing regulation into a speech restriction, thousands of routine regulations could become subject to heightened First Amendment scrutiny.

Petitioners' invitation to open the door to additional judicial oversight of the choices made by the political branches to regulate economic activity should be firmly rejected.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Dated: New Haven, CT
December 21, 2016

Respectfully submitted,

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APPENDIX

The amici are legal scholars specializing in constitutional, administrative, contract, and health law. They have substantial expertise in issues directly affected by the outcome in this case. These amici are listed below. Institutional affiliations are listed for identification purposes only.

Ian Ayres, William K. Townsend Professor of Law and the Anne Urowsky Professorial Fellow in Law, Yale Law School, Professor, Yale School of Management.

Jack Balkin, Knight Professor of Constitutional Law and the First Amendment, Founder and Director of the Information Society Project, Director of the Abrams Institute for Freedom of Expression, and Director of the Knight Law and Media Program, Yale Law School.

Leo Beletsky, Associate Professor of Law and Health Sciences, Northeastern University School of Law and Bouvé College of Health Sciences.

Ashutosh Bhagwat, Martin Luther King, Jr. Professor of Law, University of California, Davis, School of Law.

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Scott Burris, Professor of Law; Director of Public Health Law Center for Health Law, Policy and

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Shubha Ghosh, Vilas Research Fellow & George Young Bascom Professor in Business Law, University of Wisconsin Law School.

Amy Kapczynski, Professor of Law, Yale Law School, Faculty Director of the Global Health Justice Partnership, Yale Law School and Yale School of Public Health.

Aaron Kesselheim, Associate Professor of Medicine, Harvard Medical School, Visiting Associate Professor of Law, Yale Law School, Distinguished Visitor, Solomon Center for Health Law and Policy.

Jeremy Kessler, Associate Professor of Law, Columbia Law School.

Jonathan M. Manes, Assistant Clinical Professor of Law, University at Buffalo School of Law, State University of New York.

Helen Norton, Professor of Law and Ira C. Rothgerber, Jr. Chair in Constitutional Law, University of Colorado Boulder Law School.

Wendy E. Parmet, Matthews Distinguished University Professor of Law, Director of the Center for Health Policy and Law, and Associate Dean for Interdisciplinary Education and Research Support, Northeastern University School of Law; Professor of

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